IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 348

CURTIS D. MacDOUGALL, et al.,
Plaintiffs-Appellants.

vs.

DWIGHT H. GREEN, Individually and as Governor of the State of Illinois, et al.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

APPELLANTS' MOTION TO ADVANCE AND EXPEDITE THE HEARING AND DISPOSITION OF THIS CAUSE UPON SUGGESTION THAT IT INVOLVES A SUBSTANTIAL CLAIM OF CONSTITUTIONAL RIGHT TO HAVE THE NAMES OF PROGRESSIVE PARTY CANDIDATES FOR STATE AND FEDERAL OFFICES PRINTED ON THE BALLOTS OF ILLINOIS AT THE NOVEMBER 2, 1948 ELECTION

and

BRIEF IN SUPPORT THEREOF.

JOHN J. ABT,
H. B. RITMAN,
RICHARD F. WATT,
EDMUND HATFIELD,
MILTON T. RAYNOR,
BERNARD WEISSBOURD,
188 West Randolph St.,
Chicago, Illinois,
Attorneys for Plaintiffs-Appellants.

MALCOLM P. SHARP,
The Law School, University of Chicago,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO

NOTICE AND PROOF OF SERVICE.

Please take notice that on 13th day of October, A. D. 1948, or as soon thereafter as the convenience of the Court will permit, we shall present to the United States Supreme Court in Washington, D. C., in the above-entitled cause, a Motion to Advance and Expedite the Cause and a Brief in Support Thereof, a copy of which is served upon you herewith. At which time you may appear or be represented by counsel if you so see fit.

JOHN J. ABT,
H. B. RITMAN,
RICHARD F. WATT,
EDMUND HATFIELD,
MILTON T. RAYNOR,
BERNARD WEISSBOURD,

By.....
Attorneys for Plaintiff-Appellants.

Received true and exact copies of the Motion to Advance and Expedite the Cause and a Brief in Support Thereof and of this Notice and Proof of Service this ..... day of October, 1948.

.....	.....
Attorney-General, State of Illinois.	*Attorney, County Clerk of Cook County.*
.....	.....
Attorney, City Clerk of City of Chicago.	*Attorney for Michael J. Flynn, individually.*
.....	.....
Attorney for Board of Election Commissioners, City of Chicago, and Commissioners.	

AFFIDAVIT OF SERVICE.

....., being duly sworn, deposes and says that he is one of the Attorneys in the above-entitled cause, that he gave notice of the Motion to Advance and Expedite the Cause by sending on October 12, 1948 a telegraphic notice of said Motion to each party of record and by depositing on October 12, 1948 in a United States Mail Box in the City of Chicago a copy of said Motion addressed to each party of record.

.....

Subscribed and sworn to before me by .....

....., who is to me personally known,

this ..... day of October, A. D. 1948.

.....

Notary Public.

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THE OBJECT OF THIS MOTION.

This case, as more fully appears immediately *post*, involves claims of a federal right by the Progressive Party in Illinois, its members and candidates for office, which claims the Attorney General of Illinois concedes to be not merely substantial but well founded and entitling appellants to relief, grounded upon United States constitu-

tional provisions and statutes, to have the names of its candidates for President, Vice-President, United States Senator, and state officers printed on the November 2, 1948, Illinois state ballot.

The Attorney General of Illinois stated in open court through his assistant, Mr. William C. Wines, not only that apellants' jurisdictional claims were substantial, but that in the Attorney General's opinion, the appellants were entitled to a decree in substantial conformity with the prayer of their complaint.

The printing of Illinois ballots is now in progress in Illinois' 102 counties. The dealine for printing absentee ballots has already passed. **It is of urgent import that this cause be decided at the earliest moment that the Court's convenience will permit.**

This motion is for such order of this Court as will advance and expedite the hearing and decision of this cause in the light of the emergency that the case presents. Specifically appellants move:

1) That the time permited under paragraph 3 of Rule 12 of the Rules of this Court for the filing of a statement in opposition to the appellants' Statement of Jurisdiction be reduced to three days;

2) That Briefs be made due on Saturday, October 16th;

3) That oral argument be had on Monday, October 18th or the first day thereafter convenient to the Court;

4) That the appeal be heard on the typewritten short record certified to this Court by the Clerk of the District Court.

The Constitutional Questions Presented.

This cause presents to this Court the following very important constitutional questions, which vitally affect the electoral franchise of Illinois voters in the coming presidential, senatorial, and state elections:

Prior to 1935, the statute authorizing the formation of new state-wide political parties in Illinois required, *inter alia*, that at least 25,000 electors sign a document authorized and prescribed by the statute and usually called a Declaration of Intention to Form a New Political Party. (Smith-Hurd Rev. Stat., 1933, Chap. 46, par. 291.) In 1935, the statute was amended so that, although the requirement of at least 25,000 signatures was retained, there was added to it the further requirement that at least 200 signatures be obtained from each of at least 50 of the 102 counties of the state. (Ill. Rev. Stat., 1948, Chap. 46, par. 10-2.)

In view of the enormous variation in the populations of Illinois' 102 counties, more than half of the state's electorate living in Cook County alone, as against many counties with less than 10,000 electors, the question arises: **Does the requirement that at least 200 signatures be obtained from each of at least 50 counties so far deny equality in voting power and therefore in electoral potential as to violate one, some, or all of the Federal and Illinois constitutional provisions guaranteeing due process of law, equal protection of the law, the privileges and immunities of citizens of the United States, and free and equal elections?**

Inasmuch as the Progressive Party nominating petition named a candidate for the office of United States Senator, to be voted on at the general election of November 2, 1947, a further constitutional question is presented: **Does the requirement that such a petition contain at least 200 signatures from each of at least 50 counties violate Amendment XVII to the United States Constitution which provides that United States Senators from each state shall be "elected by the people thereof".**

It is important to note that inasmuch as the only provision assailed as unconstitutional, that is, the provision requiring that at least 200 signatures be obtained from each of at least 50 counties, was added to the former act by way of amendment, the deletion of that amendment as unconstitutional would leave intact the legislation in its original form. The invalidation of the amendment would not nullify the whole statute. *People* v. *Alterie*, 356 Ill. 307 (1934).

The Nature of the Proceedings in the District Court.

The proceedings in the District Court were closely modeled on those in *Colegrove* v. *Green*, 328 U. S. 549, in which this Court entertained arguments as to the constitutionality of the Illinois 1901 Reapportionment Act. Four of the seven justices participating in this Court's decision in *Colegrove* v. *Green* declared that federal courts had jurisdiction to act in equity by declaratory judgment, injunction, or otherwise in cases wherein it was contended that a state statute resulted in so gross an inequity in voting power as to deny equal protection or other constitutional rights.

Accordingly, appellants filed a suit in the District Court for the Northern District of Illinois for declaratory judgment, injunction and other relief. The case was heard by a bench of three judges in accordance with the provisions of sections 2281 and 2284 of the new Judicial Code.

On October 11, 1948, the District Court denied appellants' motion for a temporary injunction and dismissed the complaint. This appeal follows.

Although *Colegrove* v. *Green* indicates that resort need not be had to the state courts where the rights claimed arise directly under the Constitution and laws of the United States, a convincing demonstration appears in the **Brief in Support of This Motion** of appellants' diligent efforts to

secure relief in the Illinois courts. In that **Brief** will also be found an explanation why appeal to or application for this Court's writ of certiorari to the Illinois Supreme Court proceedings would have been unavailing until long after the election was over.

Respectfully submitted,

CURTIS D. MACDOUGALL, ET AL.,
Plaintiffs-Appellants,

By: JOHN J. ABT,
H. B. RITMAN,
RICHARD F. WATT,
EDMUND HATFIELD,
MILTON T. RAYNOR,
BERNARD WEISSBOURD,

By.....
Attorneys for Plaintiffs-Appellants,
188 West Randolph Street,
Chicago, Illinois.

MALCOLM P. SHARP,
Of Counsel.

BRIEF IN SUPPORT OF THE MOTION.

Reference to the Motion For a Statement of the Nature of the Case and of the Questions Presented.

The Nature of the Case and of the Questions Presented sufficiently appears from the Motion, *ante*. For a fuller exposition see the appellants' **Statement of Jurisdiction.**

ARGUMENT.

I.

The questions presented are substantial. Federal Courts have jurisdiction to decide them.

The Attorney General of Illinois conceded in open court that in his opinion the 1935 Amendment to the Illinois Election Code so far frustrated substantial equality of electoral potential as to deny equal protection and due process of law. He also conceded that the amendment, which withholds from 87 per cent of the voters the right to nominate a candidate for United States Senator, contravenes the plain import of the Seventeenth Amendment.

Appellants contended, and the Attorney General conceded, that four of the seven Justices of this Court who participated in the decision of *Colegrove* v. *Green*, 328 U. S. 549, recognized federal courts' equity jurisdiction to act, by declaratory judgment or injunction, in cases where the state statute, if enforced, would deny federal constitutional rights in the matter of an election for federal office. This was true although Mr. Justice Rutledge concurred in the judgment of the Court upon the sole ground that in *Colegrove* v. *Green* the exigencies of the case required forbearance of the exercise of this jurisdiction.

United States Constitutional and Statutory Provisions Involved.

Appellants think that a state statute which so far frustrates popular sovereignty in the matter of nominating candidates for any office, state or federal, that 87 per cent of the voting population located in Illinois 49 most popu-

lous counties could not, even by unanimous petition, nominate a single officer, while granting to 25,000 citizens in 50 less populous counties the right to make such nomination, denies equal protection and due process of law and abridges the privileges and immunities of citizens of the United States in contravention of the Fourteenth Amendment.

Appellants also contend that, with particular respect to the office of United States Senator, the Seventeenth Amendment, which in effect requires United States Senators to be elected at large, contemplates that there must be a substantial equality in electoral potential, not only with regard to the casting of votes but with respect to the making of nominations. Therefore, even if the Fourteenth Amendment is not applicable, at least with respect to the office of United States Senator, the Seventeenth Amendment inhibits any such discrimination as that embodied in the Illinois amendment under attack in this case.

The case presents an alternative contention, which will be reached only if appellants' constitutional claims are not sustained, namely, that under a proper construction of the Illinois Election Code, the Illinois State Officers Electoral Board transcended its administrative authority under relevant Illinois acts when it held that persons who had voted in the Illinois primary election **for certain Republican or Democratic candidates for nomination were thereby disqualified from signing Progressive Party nominating petitions for the offices of presidential electors, inasmuch as presidential electors are not nominated at primary elections under Illinois law.**

II.

Appellants have exhausted all state remedies and have acted with all possible diligence in the assertion of their claims.

The Progressive Party, its candidates, and representatives of its large membership, filed a nominating petition with the office of the Secretary of State of the State of Illinois in accordance with the provisions of the Illinois Election Code (Ill. Rev. Stat., 1947, Chap 47, Sec. 10-2).

On August 31, 1948, the State Officers Electoral Board held this petition insufficient solely on the ground that it did not contain 200 signatures of qualified voters from each of at least 50 Illinois counties.

On September 13, 1948, the first day that the Illinois Supreme Court was in session, the Progressive Party, its candidates and representatives, sought leave to file an original petition for writ of mandamus in the Supreme Court of Illinois to compel the printing of their names upon the ballot. Leave to file this petition was denied without opinion and without the respondents having been impleaded. Obviously, petitioners could not seek certiorari to review that action, *first,* because even if this Court should grant certiorari and reverse, all that it could do upon an order denying leave to file the petition would be to remand it with directions to permit the respondents to answer and be heard, with the result that by the time the matter could be disposed of in the Illinois Supreme Court and certiorari sought and acted on here with respect to such final disposition, the election would long since have been over; and *second,* because this court lacks jurisdiction to review an order of the Supreme Court of Illinois merely denying leave to file a petition for original remedy. *White* v. *Ragen,* 324 U. S.

760. A second motion for leave to file a petition for mandamus was denied, again without opinion, on September 24, 1948.

The complaint was filed in the District Court on September 24, 1948 and the motion for an interlocutory injunction was argued on October 4, 1948.

III.

There is precedent for this Court's speedy action in election cases such as this.

In *Wood* v. *Brown*, 287 U. S. 1, an appeal was filed in this Court on October 2. Briefs were submitted on October 11 and oral argument was heard on October 13. The Court announced its decision on October 18.

In *McPherson* v. *Blacker*, 146 U. S. 1, a motion to advance the cause was filed on the second day of Term, October 11, and was granted at once. The cause was heard on that day and the decision rendered on October 17. (See the report at page 4.)

The appellants respectfully represent that the emergency here presented is equally great.

PRAYER OF THE MOTIION.

For the reasons indicated above, appellants respectfully move this Court for such order of this Court as will advance and expedite the hearing and disposition of this cause at the earliest time convenient to this Court.

Respectfully submitted,

JOHN J. ABT,
H. B. RITMAN,
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